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H.B., Appellant)	
)	
and)	Docket No. 11-2058
)	Issued: May 8, 2012
DEPARTMENT OF THE NAVY, NAVAL SEA)	
SYSTEMS COMMAND, West Palm Beach, FL,)	
Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

On September 14, 2011 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) merit decision dated March 22, 2011. She also appealed an August 17, 2011 nonmerit decision finding that she abandoned her request for a hearing. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

The issues are: (1) whether appellant met her burden of proof to establish that she developed an emotional condition in the performance of duty; and (2) whether OWCP properly determined that appellant abandoned her request for a hearing.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 27, 2010 appellant, then a 50-year-old administrative technician specialist, filed an occupational disease claim alleging that she developed severe depression, anxiety and stress disorders due to a hostile work environment and negative personnel actions. She noted a date of injury of February 4, 2009 and realized her condition was caused by her work on October 4, 2010. Appellant stopped work on October 4, 2010 and did not return.

In statements dated November 3 and 8, 2010, appellant asserted that Mike Knecht, head of testing and operations, on February 11, 2010, advised her that she was being replaced due to the failure of a security compliance audit and would be transferred to another facility. She asserted that she was required to train her replacement which caused her emotional stress. Appellant alleged that her commander, Jeff Pafford, made comments to her and believed she was spying on him and reporting his behavior back to the authorities. She asserted that in 2008 there was a serious security compromise to which she, but not her managers, were privy. Appellant indicated that her supervisor, Harriet Coleman, was upset because appellant failed to inform her of the investigation surrounding the security breach and thereafter appellant was subject to retribution from management.

On November 15, 2010 OWCP asked appellant and the employing establishment to provide additional evidence.

Appellant submitted a December 16, 2010 statement and asserted that from October 29, 2008 to February 3, 2009 she had several acts of retaliation for working on a counter intelligence case; that on February 4, 2009 she was reprimanded by her supervisor for reporting issues to the authorities and others outside their command; and that in March 2009 her supervisor attempted to remove a portion of her job duties and then transferred her back to Florida. She submitted an October 4, 2010 note from Dr. Frantz Saint Louis, a Board-certified internist, who noted that she was excused from work from September 27 to October 8, 2010. Appellant submitted reports from Dr. Leslie H. Schwartz, a Board-certified psychiatrist, from October 20, 2010 to January 20, 2011, who treated her for major depressive disorder, recurrent and panic disorder with occupational stressors. Dr. Schwartz advised that appellant was totally disabled. Appellant also submitted an October 25, 2010 e-mail asserting that her supervisor, Mr. Knecht, falsely filled out her application for leave which indicated that she volunteered for a 120-day detail when she had been "clearly" relieved from her duties as security manager for reporting security problems and for requiring military and government personnel to follow security regulations. She also submitted a job description for an administrative technician specialist.

The employing establishment submitted a December 2, 2010 statement from Mr. Knecht, who indicated that he did not observe appellant having any symptoms in the workplace. Mr. Knecht indicated that appellant received satisfactory performance ratings. He disagreed that appellant's job conditions were unusually stressful. Mr. Knecht noted that appellant revealed suffering from stress-related disorders in the past prior to her employment and no underlying disability requiring accommodation was made known to him. He denied appellant's allegations that she had a conflict with leadership. Mr. Knecht also strongly denied that he engaged in any misconduct and indicated that he was unaware of any misconduct by any other management officials.

Also submitted was a letter from the Office of Special Counsel to appellant advising her that further inquiry was warranted into her complaint against officials of the employing establishment who she alleged curtailed her overseas assignment and subjected her to significant change in duties and or reassignment.

In a decision dated March 22, 2011, OWCP denied appellant's claim finding that the claimed emotional condition did not occur in the performance of duty. It found that she did not establish any compensable work factors.

On March 28 and April 19, 2011 appellant requested an oral hearing. She submitted an April 5, 2011 attending physician's report from Dr. Swartz. On June 14, 2011 OWCP advised appellant that a telephone hearing would be held on July 26, 2011 at 3:30 p.m., eastern time. It instructed her to call the provided toll-free number a few minutes before the hearing time and enter the pass code to gain access to the conference call. OWCP mailed the June 14, 2011 letter to appellant's address of record.

By decision dated August 17, 2011, OWCP found that appellant had abandoned her request for a hearing. It determined that she received a written notice of the hearing 30 days before the scheduled hearing but did not appear and did not explain her absence either before or after the scheduled hearing.

LEGAL PRECEDENT -- ISSUE 1

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.²

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,³ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.⁴ When an employee experiences emotional stress in carrying out his or her employment duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed

² *George H. Clark*, 56 ECAB 162 (2004).

³ 28 ECAB 125 (1976).

⁴ *See Robert W. Johns*, 51 ECAB 137 (1999).

by the employing establishment or by the nature of the work.⁵ Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁶ Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.⁷ Personal perceptions alone are insufficient to establish an employment-related emotional condition.⁸ On the other hand the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁹

ANALYSIS -- ISSUE 1

Appellant alleged an emotional condition as a result of being transferred to a different worksite. She asserted that she was required to train her replacement and her commander, made improper comments to her. Appellant asserted that from October 29, 2008 to February 3, 2009 she was subject to acts of retribution for working on a counter intelligence case and on February 4, 2009 she was reprimanded by her supervisor for reporting issues to the authorities and others outside our command. The Board must thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA. Appellant has not attributed her emotional condition to the regular or specially assigned duties of her position as an administrative technician specialist. Therefore, she has not alleged a compensable factor under *Cutler*.¹⁰

Appellant made several allegations related to administrative and personnel actions. In *Thomas D. McEuen*,¹¹ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹²

⁵ *Lillian Cutler*, *supra* note 3.

⁶ *J.F.*, 59 ECAB 331 (2008).

⁷ *M.D.*, 59 ECAB 211 (2007).

⁸ *Roger Williams*, 52 ECAB 468 (2001).

⁹ *See Lillian Cutler*, *supra* note 3.

¹⁰ *Id.*

¹¹ *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹² *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

Appellant asserted that on February 11, 2010 Mr. Knecht advised her that she was being replaced due to the failure of a security compliance audit and would be transferred. The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.¹³ The employing establishment has either denied these allegations or contended that it acted reasonably in these administrative matters. Mr. Knecht noted that appellant received satisfactory performance ratings and denied any allegation of misconduct. Appellant has presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to these allegations. Thus she has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under FECA.

Appellant asserted that she was required to train her replacement which caused her stress. The Board notes that the assignment of work is an administrative function¹⁴ and the manner in which a supervisor exercises his or her discretion falls outside the ambit of FECA. Absent evidence of error or abuse, appellant's mere disagreement or dislike of a managerial action is not compensable.¹⁵ The Board finds that appellant has not offered sufficient evidence to establish error or abuse regarding her work assignments. The evidence does not establish that the employing establishment acted unreasonably.¹⁶ Appellant has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under FECA.

Appellant asserted that on February 4, 2009 she was reprimanded by her supervisor for reporting issues to the authorities and others outside the command. Her allegation that the employing establishment improperly disciplined her relates to an administrative or personnel matter unrelated to her regular or specially assigned duties and does not fall within the coverage of FECA.¹⁷ Although the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁸ The record, as noted above, fails to establish that appellant was disciplined. Appellant's supervisor noted that appellant received satisfactory performance ratings. To the extent that appellant is complaining about the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, is outside the scope of coverage provided by FECA. This principle recognizes that a

¹³ *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

¹⁴ *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹⁵ See *Barbara J. Latham*, 53 ECAB 316 (2002); see also *Peter D. Butt Jr.*, 56 ECAB 117 (2004) (allegations such as improperly assigned work duties, which relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties do not fall within the coverage of FECA).

¹⁶ *D.L.*, 58 ECAB 217 (2006).

¹⁷ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

¹⁸ *Id.*

supervisor or manager in general must be allowed to perform his duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.¹⁹ Absent evidence of error or abuse, appellant's mere disagreement or dislike of a managerial action is not compensable.²⁰ The Board finds that appellant has not offered sufficient evidence to establish error or abuse and evidence does not establish that the employing establishment acted unreasonably. Appellant has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under FECA.

Appellant asserted that from October 29, 2008 to February 3, 2009 she was subject to several acts of retaliation from her supervisors for working on a counter intelligence case. To the extent that incidents alleged as constituting harassment or a hostile environment by a supervisor are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.²¹ However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under FECA.²² The factual evidence fails to support appellant's claim for harassment. The record does not support her allegation that she was harassed or worked in a hostile work environment. Mr. Knecht, as noted, denied appellant's allegations that there was conflict with leadership and management and denied any allegation of misconduct. There is no corroborating evidence to support that the employer treated appellant disparately. Appellant has not established a compensable factor of employment in this regard.

To the extent that appellant alleged that her commander, Mr. Pafford, made improper comments to her, the Board has recognized the compensability of verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.²³ The Board finds that the facts of the case do not support any specific incidents of verbal abuse. Appellant provided no corroborating evidence, or witness statements to establish her allegations at a particular time and place.²⁴ There is no corroborating evidence to support that any verbal interaction with appellant by Mr. Pafford or others rises to the level of a compensable employment factor.²⁵

¹⁹ See *Marguerite J. Toland*, 52 ECAB 294 (2001).

²⁰ See *Barbara J. Latham*, *supra* note 15.

²¹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

²² *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991). See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

²³ *Charles D. Edwards*, 55 ECAB 258 (2004).

²⁴ See *William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

²⁵ See *Judy L. Kahn*, 53 ECAB 321 (2002) (the fact that a supervisor was angry and raised her voice does not, by itself, support a finding of verbal abuse).

Consequently, appellant has not established her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.²⁶ She may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.²⁷ Unless otherwise directed in writing by the claimant, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.²⁸

The authority governing the abandonment of hearings rests with OWCP's procedure manual, which provides that a hearing can be abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned her request for a hearing and return the case to the district OWCP.²⁹

ANALYSIS -- ISSUE 2

By decision dated March 22, 2011, OWCP denied appellant's claim for an occupational disease. Appellant timely requested an oral hearing. In a June 14, 2011 letter, OWCP notified her that a telephone hearing was scheduled for July 26, 2011 at 3:30 p.m. eastern time. It instructed appellant to telephone a toll-free number and enter a pass code to connect with the hearing representative. Appellant did not telephone at the appointed time. She did not request a postponement of the hearing or explain her failure to appear at the hearing within 10 days of the scheduled hearing date of July 26, 2011.³⁰ The Board therefore finds that she abandoned her request for a hearing.

²⁶ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

²⁷ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

²⁸ 20 C.F.R. § 10.617(b).

²⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999). *See also G.J.*, 58 ECAB 651 (2007).

³⁰ *Id.*

On appeal appellant asserted that she became ill and required surgery and could not attend the hearing but she did not abandon the hearing. She requested that the Board issue a decision on the record. As explained, appellant failed to request a postponement; failed to appear at a scheduled hearing; and failed to provide any notification for such failure within 10 days of the scheduled date and therefore abandoned her request for an oral hearing.³¹

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty. The Board further finds that appellant abandoned her request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the August 17 and March 22, 2011 of the Office of Workers' Compensation Programs are affirmed.

Issued: May 8, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

³¹ *Id.*